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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ELIZABETH WATERMAN,

Plaintiff,

v.

TIKTOK INC.,

Defendant.

Case No. 2:24-CV-04802-AB-AJR

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION TO
DISMISS COMPLAINT**

Hon. André Birotte Jr.
Date: October 18, 2024
Time: 10:00 a.m.
Courtroom: 7B

Complaint filed: June 7, 2024

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1 As set forth in Defendant TikTok Inc.’s (“Defendant” or “TTI”) Motion to
2 Dismiss (the “Motion”), Plaintiff Elizabeth Waterman’s (“Plaintiff”) Complaint
3 merely recites threadbare and conclusory allegations of copyright infringement. Dkt.
4 24 at 1. Plaintiff’s Opposition to the Motion (the “Opposition”) fails to identify any
5 pleaded facts to suggest otherwise. *See* Dkt. 29. Plaintiff’s Complaint should be
6 dismissed.

7 **I. INTRODUCTION**

8 Plaintiff argues—without support—that because she has lumped her direct,
9 vicarious, and contributory copyright infringement claims into a single cause of
10 action, the Court cannot dismiss any of them if any one theory is adequately pleaded.
11 *See* Dkt. 29 at 8-9. Hiding deficiently-pleaded claims behind an adequately pleaded
12 one is simply not proper and finds no support in *Twombly* and *Iqbal*. Moreover,
13 numerous cases have come to the exact opposite conclusion advanced by Plaintiff.
14 Regardless, Plaintiff fails to adequately plead any of her theories in the Complaint
15 and Plaintiff’s Opposition fails to save them for several reasons.

16 *First*, Plaintiff admits that “a direct infringement theory of liability has not
17 been properly set forth in the Complaint.” Dkt. 29 at 9. Further, Plaintiff does not
18 contend that she would be able to plead direct infringement if given leave to amend.
19 *See id.* This admitted deficiency requires dismissal of Plaintiff’s direct copyright
20 infringement theory with prejudice.

21 *Second*, Plaintiff contends she has adequately alleged vicarious copyright
22 infringement, but the only pleaded allegations she identifies in support of this
23 argument are conclusory recitations of the elements. Dkt. 29 at 4-6. Plaintiff’s
24 vicarious copyright infringement theory should be dismissed with prejudice.

25 *Third*, Plaintiff argues that contributory copyright infringement is
26 “automatically established” by allegations of knowledge of infringement. Dkt. 29 at
27 6-8. This is not the standard and Plaintiff fails to allege facts supporting this theory
28

1 in any event. Plaintiff's contributory copyright infringement theory should be
2 dismissed with prejudice.

3 **II. ARGUMENT**

4 **A. The Court Should Separately Analyze and Dismiss Any of**
5 **Plaintiff's Insufficiently Pleaded Infringement Theories**

6 Realizing that the allegations for one or more of her infringement theories are
7 deficient, Plaintiff argues that "Plaintiff does not assert separate claims for direct,
8 vicarious, and/or contributory infringement, but rather a single claim that is based on
9 any of those theories of liability. As a result, assuming that Plaintiff has plead [sic]
10 a plausible claim on any *one* of those theories of infringement, dismissal of the claim
11 is improper." Dkt. 29 at 9. Notably, Plaintiff does not cite any authority in support
12 of this argument. *See id.* This Court routinely dismisses inadequately pleaded
13 alternative theories and it should do so here.

14 Direct, contributory and vicarious copyright infringement theories are "related,
15 but distinct" concepts. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788,
16 802 (9th Cir. 2007) (noting that contributory infringement "is based on tort-law
17 principles" whereas vicarious infringement is based on "agency principles"). For this
18 reason, this Court and others in the Ninth Circuit have found that the theories "must
19 be asserted as separate, independent claims." *Minx Int'l, Inc. v. Club House*
20 *Creations, Inc.*, No. 2:15-cv-05645-CAS-PLA, 2016 U.S. Dist. LEXIS 29615, at *13
21 (C.D. Cal. Mar. 7, 2016) ("The FAC appears to assert a single claim," however,
22 "claims for vicarious copyright infringement and contributory copyright
23 infringement must be asserted as separate, independent claims") (quoting *Perfect 10,*
24 *Inc.*, 494 F.3d at 802); *Reilly v. Wozniak*, No. CV-18-03775-PHX-MTL, 2021 U.S.
25 Dist. LEXIS 99861, at *8 (D. Az. May 26, 2021) ("Contributory and vicarious
26 copyright infringement are distinct claims with unique standards of proof that must
27 be alleged separately from direct copyright infringement.").

1 When faced with a single claim asserting separate copyright infringement
2 theories, Courts analyze the theories separately. *See Louis Vuitton Malletier, S.A. v.*
3 *Akanoc Solutions, Inc.*, 591 F. Supp. 2d 1098, 1103 n. 6 (N.D. Cal. 2008) (“Plaintiff
4 organizes its Complaint . . . by treating contributory and vicarious copyright
5 infringement as the same cause of action,” because they “are distinct legal theories
6 . . . the Court discusses each as a separate cause of action”); *Klauber Bros., Inc. v.*
7 *Roma Costumes, Inc.*, No. 2:22-cv-04425-MEMF-MAR, 2023 U.S. Dist. LEXIS
8 100345, at *21 (C.D. Cal. June 7, 2023) (dismissing contributory and vicarious
9 liability theories that “Plaintiff’s Complaint lump[ed] into one cause of action” and
10 ordering Plaintiff “to separate the two claims into separate causes of action” if it
11 “elects to file an amended complaint”). Indeed, in *BackGrid USA, Inc. v. Twitter,*
12 *Inc.*, a case on which Plaintiff relies extensively, the court separately analyzed
13 plaintiff’s infringement theories, even though plaintiff pleaded a claim of “direct,
14 contributory, and vicarious copyright infringement.” No. CV 22-9462-DMG-ADX,
15 2024 U.S. Dist. LEXIS 103090, at *1 (C.D. Cal. June 7, 2024). Further, in *Stross v.*
16 *Meta Platforms, Inc.*, a case on which both parties rely, plaintiff alleged a cause of
17 action for both “vicarious and contributory infringement.” No. 2:21-cv-08023-MCS-
18 AS, 2022 U.S. Dist. LEXIS 100689, at *3 (C.D. Cal. Apr. 6, 2022). Because plaintiff
19 pleaded “the vicarious and contributory infringement theories in the alternative” the
20 Court “treat[ed] them as separate theories” and proceeded to separately examine the
21 allegations for each theory—granting defendant’s motion to dismiss with respect to
22 the vicarious infringement theory and denying it with respect to the contributory
23 infringement theory. *Id.* at *3, 12.

24 Similarly here, each of Plaintiff’s theories is pleaded in the alternative and
25 should be addressed separately. Dkt. 1 ¶ 30 (“Alternatively, . . . Defendant is liable
26 for vicarious liability.”), ¶ 33 (“Alternatively, . . . Defendant is liable for contributory
27 infringement.”). Plaintiff cannot use her failure to plead each theory as a separate
28 cause of action as a shield to protect any insufficiently pleaded theories.

1 The Court can, and should, analyze each of Plaintiff's theories and dismiss any
2 theory that it finds deficient. As set forth below, Plaintiff fails to plausibly allege
3 facts supporting *any* theory and the Complaint should be dismissed with respect to
4 all three infringement theories.

5 **B. Plaintiff Admits She Failed to Plead a Direct Infringement**
6 **Theory and That Theory Should be Dismissed with Prejudice**

7 In its Motion, Defendant cited several cases that show Plaintiff has not—and
8 cannot—plausibly allege that Defendant engaged in any volitional conduct required
9 to support a direct copyright infringement claim. Dkt. 24 at 3-6. Plaintiff agrees:
10 “based on the caselaw Defendant has cited in the Motion, it does appear that a direct
11 infringement theory of liability has not been properly set forth in the Complaint.”
12 Dkt. 29 at 9.

13 Still, Plaintiff contends her direct infringement theory should proceed because
14 “discovery with respect to her other theories of liability . . . very well *could reveal*
15 additional facts to support a direct liability theory.” Dkt. 29 at 9 (emphasis added).
16 Plaintiff's speculation that she may some day in the future unearth information
17 sufficient to plead a direct infringement theory is not sufficient. *E.g. Whitaker v.*
18 *Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021) (“Our case law does not
19 permit plaintiffs to rely on anticipated discovery to satisfy Rules 8 and 12(b)(6);
20 rather, pleadings must assert well-pleaded factual allegations to advance to
21 discovery.”) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)). “Hoping”
22 to find facts during discovery does not give Plaintiff a pass on satisfying the pleading
23 requirements under *Twombly* and *Iqbal*.

24 Moreover, Plaintiff does not even contend that she would be able to adequately
25 plead direct infringement if given leave to amend. *See* Dkt. 29 at 9. She has already
26 had the opportunity to replead in response to this motion and failed to do so.
27 Plaintiff's direct copyright infringement theory must be dismissed with prejudice.
28

1 **C. Plaintiff’s Conclusory Allegations of Vicarious Infringement**
2 **are Insufficient and Her Vicarious Infringement Theory**
3 **Should be Dismissed with Prejudice**

4 The parties agree that pleading vicarious copyright infringement requires
5 allegations that TTI (1) exercises control over the infringing conduct and (2) has a
6 direct financial interest in the infringing activity. Dkt. 24 at 6; Dkt. 29 at 4.

7 As to the first element, for the reasons set forth in Defendant’s Motion,
8 Plaintiff has failed to allege any facts to plausibly suggest that TTI exercises control
9 over the infringing conduct. Dkt. 24 at 6-7. To argue otherwise, Plaintiff cites to
10 cases where the Court found allegations relating to control sufficient. Dkt. 29 at 4-5
11 (citing *Stross v. Zillow Inc.*, No. 2:21-cv-01489-RAJ-BAT, 2022 U.S. Dist. LEXIS
12 147735, at *21 (W.D. Wash. June 21, 2022) and *BackGrid USA*, 2024 U.S. Dist.
13 LEXIS 103090, at *13). However, the complaints in both cases included *factual*
14 allegations relating to defendants’ control over the infringing content and the contents
15 of DMCA takedown notices submitted in those cases.

16 For example, in *BackGrid* the Plaintiff alleged that its takedown notices
17 contained links to the specific acts of infringement at issue and Plaintiff pleaded facts
18 relating to Twitter’s advertising and copyright policies to establish control. *BackGrid*
19 *USA*, 2024 U.S. Dist. LEXIS 103090, at *10, *14-15. This included allegations that
20 Twitter plays an “active role” in positioning the infringing content alongside
21 advertisements to increase its own revenue, and details relating to Twitter’s literal
22 and technical ability to remove content. *Id.* at *2-3. These underlying facts supported
23 Plaintiff’s allegation that Twitter had the “literal power to stop or limit the
24 infringement.” *Id.* at *14 (citation and quotation omitted).

25 Similarly, in *Stross* the Plaintiff attached the DMCA takedown notices to the
26 complaint and the Court, looking at the “face” of the takedown notices, found Zillow
27 had the “technical ability” to identify and remove the images at issue based on the
28 contents of the notices. *Zillow Inc.*, 2022 U.S. Dist. LEXIS 147735, at *19-20.

1 Zillow’s technical ability was not established by the takedown notice alone; rather,
2 Plaintiff presented facts relating to Zillow’s practice of employing “automated
3 programming” to remove images from its website upon the expiration of licensing
4 agreements and that the automated program failed to remove the subject images when
5 required. *Id.* at *4-5. It was in this context that the Court found Plaintiff sufficiently
6 alleged “control.”

7 In contrast, all Plaintiff alleges here is that she sent takedown notices. Dkt. 1
8 ¶¶ 21-22. Notably missing from her Complaint are any details relating to the contents
9 of the notices or any allegations to suggest that TTI has the requisite control, such as
10 facts relating to TTI’s policies, practices, or technical abilities. *See* Dkt. 24 at 6-7.
11 Plaintiff has not alleged that TTI has the requisite control.

12 As to the second element, Plaintiff would have the Court believe that she
13 adequately alleged that “Defendant received a financial benefit through the increased
14 traffic” to TikTok and contends that Defendant’s arguments to the contrary “is simply
15 a parsing of words.” Dkt. 29 at 5-6. Plaintiff’s argument misses the point. Her
16 threadbare, conclusory allegation relating to this element is wholly unsupported by
17 any facts and cannot survive dismissal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678
18 (2009) (“[t]hreadbare recitals of the elements of a cause of action, supported by mere
19 conclusory statements” are insufficient).

20 The only allegation that Plaintiff identifies as relating to this element—and the
21 only allegation that even tangentially relates to Defendant’s alleged financial interest
22 in the infringing conduct—is reproduced below, in its entirety:

23 Defendant has a direct financial interest in the profits from the
24 infringing activity. A direct financial interest can involve increased
25 traffic.

26 Dkt. 1 ¶ 32; Dkt. 29 at 5-6. Nowhere in the Complaint does Plaintiff plead facts to
27 suggest that TTI, or any of its users, derive any “profits from the infringing activity.”
28 *See* Dkt. 1. Nowhere in the Complaint does Plaintiff plead any facts to suggest that

1 TTI has “a direct financial interest” in any such profits. *Id.* Nowhere in the
2 Complaint does Plaintiff plead any facts to suggest that the alleged infringing activity
3 has caused any “increased traffic” to TikTok. *Id.* Nowhere in the Complaint does
4 Plaintiff plead any facts to suggest that an increase in traffic to TikTok, even if
5 present here, would lead to financial benefit to TTI. *Id.* The Complaint does not
6 contain any facts relating to how TTI generates revenue generally or how or whether
7 TTI derives revenue from user-created content, let alone any facts to suggest that TTI
8 derived revenue from the images at issue here.

9 In short, the Complaint is devoid of any factual allegations suggesting that TTI
10 has any financial interest in the allegedly infringing content posted by its users or that
11 “customers were drawn to [TTI’s] services *because of the infringing [content] at*
12 *issue.*” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673-74 (9th Cir. 2017); *see*
13 *also Meta Platforms, Inc.*, 2022 U.S. Dist. LEXIS 100689, at *8 (dismissing
14 vicarious liability claim where the complaint alleged that “40% of the traffic” on
15 Facebook related to pages with “copyright-infringed content” but lacked any
16 allegations that plaintiff’s works were a draw to Facebook’s users).

17 Plaintiff’s Complaint is clearly deficient and her inability to present facts
18 supporting the requisite control or direct financial interest element renders
19 amendment of the Complaint futile. *See Kilina Am. Inc. v. Bonded Apparel, Inc.*, No.
20 CV 19-4018-PSG-SK, 2019 U.S. Dist. LEXIS 228186, at *6-7 (C.D. Cal. Nov. 19,
21 2019) (dismissing vicarious copyright infringement claim without leave to amend
22 where the complaint included only “threadbare recitals of the elements”).

23 Plaintiff’s vicarious copyright infringement theory should be dismissed with
24 prejudice.

25 **D. Plaintiff’s Fails to Plead Facts Supporting Her Contributory**
26 **Infringement Theory and It Should be Dismissed with**
27 **Prejudice**

28 In addition to alleging direct infringement by a third party, pleading

1 contributory copyright infringement requires factual allegations (1) of defendant's
2 knowledge of that third party's direct infringement; and (2) that the defendant
3 materially contributed to that infringement. *Giganews*, 847 F.3d at 670. For the
4 material contribution element, Plaintiff must allege that TTI "can take simple
5 measures to prevent further damage to copyrighted works, yet continues to provide
6 access." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007)
7 (citation omitted).

8 Plaintiff collapses this inquiry to a single element, arguing "[a]ctual
9 knowledge automatically establishes a 'material contribution' theory of contributory
10 infringement." Dkt. 29 at 7 (citing *Giganews*, 847 F.3d at 671). Plaintiff is wrong.
11 In the case Plaintiff cites in support of this argument, *Giganews*, the Ninth Circuit
12 found the material contribution element *was not* satisfied "[e]ven assuming that
13 [Plaintiff's] takedown notices were sufficient to confer actual knowledge on
14 [Defendant]." 847 F.3d at 671 (rejecting the contributory infringement theory and
15 finding "*Giganews* was not able to take simple measures to remove infringing
16 materials"); *see also Zillow Inc.*, 2022 U.S. Dist. LEXIS 147735, at *20 (finding the
17 complaint sufficiently alleged Zillow "had actual knowledge" but "the Court is
18 unable to conclude that the information contained in the DMCA Takedown Notice
19 was specific enough to allow Zillow to take 'simple measures' to remedy the
20 violation"). There is no "automatically establishing" these elements and Plaintiff
21 failed to plead facts for either element.

22 As set forth in Defendant's Motion, the Complaint merely offers the
23 conclusion that Plaintiff provided takedown notices to Defendant, without pleading
24 any facts or context relating to, among other things, the contents of the notices. Dkt.
25 24 at 9-10; *see also supra* Section II.C. Plaintiff's conclusory allegations are
26 insufficient to suggest that TTI had actual notice of the specific instances of
27 infringement at issue in the Complaint. *See Epikhin v. Game Insight N. Am.*, No. 14-
28 CV-04383-LHK, 2015 U.S. Dist. LEXIS 66188, at *13-14 (N.D. Cal. May 20, 2015)

1 (“threadbare assertions that [defendant] had knowledge of the infringing acts relating
2 to Plaintiff’s copyrighted works” are insufficient); *see YZ Prods. v. Redbubble, Inc.*,
3 545 F. Supp. 3d 756, 764 (N.D. Cal. 2021) (dismissing contributory infringement
4 claims where the Complaint only contained conclusory allegations that “Plaintiff
5 notified Defendant of its infringement” and that “Defendant had specific knowledge
6 of the Infringing Goods”).

7 Similarly, the Complaint fails to plead facts supporting the material
8 contribution element. *See* Dkt. 24 at 10. As set forth above, the material contribution
9 element requires factual allegations that defendant (a) “can take simple measures to
10 prevent further damage;” and (b) “continues to provide access.” *Amazon.com*, 508
11 F.3d at 1172. Throughout Plaintiff’s Opposition, Plaintiff only references her
12 allegations that she sent “takedown notices” and that TTI “failed to act.” Dkt. 29 at
13 10 (“Plaintiff has purported that Defendant had actual knowledge of the
14 infringements via the DMCA takedown notices provided, yet failed to act”). That is
15 because the Complaint only includes those allegations. *See* Dkt. 1 ¶¶ 21-22. Wholly
16 absent from Plaintiff’s Complaint are any “simple measures” that TTI could have
17 taken—there are no allegations relating to what “act” TTI allegedly failed to take.
18 *See id.* Plaintiff’s allegations are insufficient. *Nat’l Photo Grp., LLC v. Allvoices,*
19 *Inc.*, No. C-13-03627 JSC, 2014 U.S. Dist. LEXIS 9190, at *21 (N.D. Cal. Jan. 24,
20 2014) (dismissing contributory infringement claim where the complaint “fails to
21 allege what ‘simple measures’ Defendant failed to take to prevent further damage to
22 the copyrighted photographs”).

23 Plaintiff’s contributory copyright infringement theory should be dismissed
24 with prejudice.

25 **III. CONCLUSION**

26 For the foregoing reasons, TTI respectfully asks the Court to grant its Motion
27 and dismiss Plaintiff’s Complaint.

1 Dated: October 4, 2024

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14
15 **L.R. 11-6.2. Certificate of Compliance**

16 The undersigned, counsel of record for Defendant TikTok, Inc. certifies that
17 this brief contains 2814 words, which complies with the word limit of L.R. 11-6.1.
18

19 Dated: October 4, 2024

/s/ J. Michael Keyes
J. Michael Keyes, SBN 262281

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2024, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, which shall send notification of such filing to all counsel of record. Any counsel of record who has not consented to electronic service through the Court's CM/ECF system will be served by electronic mail.

/s/ J. Michael Keyes
J. Michael Keyes, SBN 262281